

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of :  
:  
the Application of : Index No. 40/265 /12  
:  
Benjamin M. Lawskey, Superintendent of Financial :  
Services of the State of New York, for an order to take :  
possession of the property of and rehabilitate :  
:  
FINANCIAL GUARANTY INSURANCE :  
COMPANY. :  
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**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION  
OF THE SUPERINTENDENT OF FINANCIAL SERVICES  
OF THE STATE OF NEW YORK**

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Eric T. Schneiderman, Attorney General of the State of New York (the “**Attorney General**”), on behalf of Benjamin M. Lawskey, Superintendent of Financial Services of the State of New York (the “**Superintendent**”), respectfully submits this memorandum of law in support of the Superintendent’s accompanying verified petition (the “**Rehabilitation Petition**”),<sup>1</sup> dated June 11, 2012, in which the Superintendent seeks, pursuant to Article 74 of the New York Insurance Law (the “**NYIL**”), an order, substantially in the form annexed thereto as **Exhibit A**, (the “**Proposed Rehabilitation Order**”): (i) appointing the Superintendent and his successors in office as rehabilitator (“**Rehabilitator**”) of Financial Guaranty Insurance Company (“**FGIC**”); (ii) directing the Rehabilitator to take possession of the property and assets of FGIC and to conduct the business thereof; (iii) directing the Rehabilitator to take such steps toward the removal of the causes and conditions that have made this rehabilitation proceeding (the “**Rehabilitation Proceeding**”) necessary; (iv) pursuant to Section 7419 of the NYIL, issuing the injunctive relief set forth in the Proposed Rehabilitation Order and described further below; (v) confirming the judicial immunity of the Rehabilitator and his employees, attorneys, representatives, and agents; and (vi) granting such other and further relief as specified below and as this Court may deem just and proper. The Superintendent also requests that, pursuant to Section 7419 of the NYIL, the Court enter an order to show cause (the “**Order to Show Cause**”) granting the injunctive relief set forth in the Order to Show Cause and described further below, pending a hearing on the Proposed Rehabilitation Order (the “**Hearing**”).<sup>2</sup>

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<sup>1</sup> Capitalized terms not otherwise defined shall have the meanings ascribed to them in the Rehabilitation Petition.

<sup>2</sup> The relevant facts are stated in the accompanying Rehabilitation Petition, which is incorporated herein by reference.

## **PRELIMINARY STATEMENT**

FGIC is a New York monoline financial guaranty insurer. Beginning in 1983 and through 2007, FGIC and its subsidiaries guaranteed the timely payment of principal and interest on structured finance obligations, municipal bonds, and other public finance obligations by issuing financial guaranty insurance policies. FGIC also guaranteed the payment obligations of its wholly-owned subsidiary, FGIC Credit Products LLC (“**FGIC CP**”), under certain credit default swap (“**CDS**”) contracts.

Since the fourth quarter of 2007, FGIC’s business, results of operations, and financial condition have been adversely affected by, among other things, significant losses on policies relating to securities backed directly or indirectly by U.S. residential mortgage loans. In January 2008, FGIC voluntarily ceased writing new financial guaranty policies and undertook a number of loss mitigation strategies that were ultimately unsuccessful.

As a New York insurance company, FGIC is regulated by the Superintendent and the New York State Department of Financial Services (the “**NYSDFS**”).<sup>3</sup> Unlike other companies, FGIC cannot be a debtor under the federal bankruptcy laws.<sup>4</sup> Instead, FGIC may only be rehabilitated or liquidated pursuant to Article 74 of the NYIL. Article 74 authorizes the Superintendent to apply for an order directing him to “rehabilitate” a financially distressed insurance company. N.Y. Ins. Law § 7402. An order to rehabilitate an insurer authorizes the Superintendent to take possession of the insurer’s property, to conduct the insurer’s business, and

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<sup>3</sup> On October 3, 2011, the New York Insurance Department (the “**NYID**”) and the New York State Banking Department merged to become the NYSDFS. All references herein to NYSDFS shall refer to the NYID if the time period at issue is before October 3, 2011.

<sup>4</sup> Section 109 of title 11 of the United States Code (the “**Bankruptcy Code**”) provides that a domestic insurance company cannot be a debtor under chapter 11.

to “take such steps towards the removal of the causes and conditions which have made such proceeding necessary as the court shall direct.” *Id.* § 7403(a).

The Superintendent submits that the interests of FGIC’s policyholders and creditors, as well as the public, are best served by placing FGIC into rehabilitation and granting the relief requested in the Order to Show Cause and the Proposed Rehabilitation Order. Case law indicates that the Superintendent’s judgment in this regard is afforded broad deference.

At least three independent statutory grounds, each alone sufficient, mandate placing FGIC into rehabilitation: (i) FGIC has consented to this Rehabilitation Proceeding; (ii) FGIC is insolvent; and (iii) FGIC has been unable to remove an impairment of its capital after being ordered to do so by the Superintendent.

Further, the injunctive relief requested in the Order to Show Cause and the Proposed Rehabilitation Order (the “**Injunctive Relief**”) falls squarely within the Court’s authority pursuant to Section 7419 of the NYIL. The Injunctive Relief includes the standard, general relief granted in New York insurance rehabilitation proceedings, as well as more specific relief tailored to the unique circumstances of a financial guaranty insurance company such as FGIC. The Superintendent believes that including FGIC CP in aspects of the Injunctive Relief is necessary and consistent with his authority under the NYIL. Finally, the provisions confirming the judicial immunity of the Rehabilitator, the New York Liquidation Bureau (the “**NYLB**”), and each of their respective employees, attorneys, representatives, and agents, are consistent with settled public policy and well-established law.

## ARGUMENT

### I. THE SUPERINTENDENT IS ENTITLED TO BROAD DEFERENCE

The Superintendent's determinations (i) that FGIC should be placed into rehabilitation and (ii) that the Injunctive Relief is necessary to enable the Superintendent to fulfill his duties as Rehabilitator are entitled to broad deference. The Superintendent, in his capacity as regulator, has been monitoring FGIC since the fourth quarter of 2007, and has been working with FGIC and its advisors to determine how to restore FGIC to solvency since FGIC first reported a deficit in its policyholders' surplus in September 2009.<sup>5</sup> The Superintendent's determination that placing FGIC into rehabilitation is in the best interest of FGIC's policyholders, creditors, and the public is the result of this lengthy and deliberate process and is entitled to broad deference.<sup>6</sup>

Further, the Superintendent is uniquely qualified to determine what relief is necessary to enable him to carry out his statutory mandate, as Rehabilitator, to "take such steps toward the removal of the causes and conditions which have made [this rehabilitation] proceeding necessary." N.Y. Ins. Law § 7403.<sup>7</sup> Given the Superintendent's expertise in the

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<sup>5</sup> Pursuant to Section 107(a)(42) of the NYIL, "policyholders' surplus" or "surplus to policyholders" means "the excess of total admitted assets over the liabilities of an insurer, which is the sum of all capital and surplus accounts minus any impairment thereof." Pursuant to Sections 4103 and 6902(b)(1) of the NYIL, FGIC, as a financial guaranty insurance company that is also licensed to write credit insurance and act as a surety, must maintain a policyholders' surplus of at least \$66.4 million.

<sup>6</sup> See e.g. *In re N.Y. Title & Mortg. Co.*, 281 N.Y.S. 715, 729 (N.Y. Sup. Ct. 1935) (in considering the Superintendent's determination that "liquidation is desirable and necessary," the court held that "[o]nly the strongest showing to the contrary could justify the court's refusal to follow the recommendations of the administrative officer to whom the supervision of insurance companies has been entrusted by the legislature."); see also *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 588 (Ky. 1995); *Minor v. Stephens*, 898 S.W.2d 71, 81 (Ky. 1995).

<sup>7</sup> See *Foster v. Mut. Fire, Marine and Inland Ins. Co.*, 531 Pa. 598, 608 (1992) (noting that, in Pennsylvania, a Rehabilitator is similarly charged to "take such action as he deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to

area of insurance and the unique challenges presented by rehabilitating FGIC, the Court should defer to the Superintendent's determination that the relief requested in the Order to Show Cause and the Proposed Rehabilitation Order, including the Injunctive Relief, is necessary to enable to the Superintendent to fulfill his duties as Rehabilitator.<sup>8</sup>

## II. FGIC SHOULD BE PLACED INTO REHABILITATION

Section 7402 of the NYIL enumerates fifteen different grounds that each, independently, warrant entry of an order directing the Superintendent to rehabilitate a New York insurer. As set forth in the Rehabilitation Petition, at least three of those grounds exist in the present case. First, Section 7402(l) of the NYIL provides that a domestic insurer may be placed into rehabilitation if it “[h]as consented to such an order through a majority of its directors, shareholders, or members.” FGIC’s board of directors has unanimously adopted resolutions consenting to the entry of an order of rehabilitation and the commencement of this Rehabilitation Proceeding, as evidenced by a Certificate of the Secretary of FGIC certifying a copy of the resolutions of FGIC’s board of directors (the “**Certificate**”), a copy of which is attached to the Rehabilitation Petition as **Exhibit E**.

Second, Section 7402(a) of the NYIL provides that the Superintendent may apply for an order to rehabilitate a domestic insurer that is insolvent within the meaning of Section

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rehabilitate the insurer” and holding that “[t]his mandate explicitly defers all actions to the skill of the Rehabilitator and implicitly recognizes her expertise in these matters”).

<sup>8</sup> See *Matter of Dinallo v. DiNapoli*, 9 N.Y.3d 94, 97 (2007) (As to his role as court-appointed receiver on behalf of distressed insurers, “the Legislature, by statutory enactment, bestowed upon the Superintendent broad fiduciary powers to manage the affairs of distressed domestic insurers and to marshal and disburse their assets.”); *Mills v. Fla. Asset Financing Co.*, 31 A.D. 3d 849, 850 (3d Dep’t 2006) (“The Legislature has granted [the Superintendent] plenary powers and broad discretion to manage, as a fiduciary, the affairs of an insolvent insurer.”).

1309 of the NYIL.<sup>9</sup> Every Quarterly Statement and Annual Statement FGIC has submitted to the Superintendent since September 30, 2009 has reflected a deficit in FGIC’s policyholders’ surplus,<sup>10</sup> and the Superintendent understands from FGIC that its policyholders’ surplus has not materially improved since its last Quarterly Statement. Thus, the Superintendent has determined that FGIC is insolvent within the meaning of the NYIL.

Third, Section 7402(c) of the NYIL provides that a domestic insurer may be placed into rehabilitation if the insurer has “failed or refused to comply, within the time designated by the superintendent, with an order of the superintendent, pursuant to law, to make good an impairment of its capital, or minimum surplus to policyholders, if a stock insurer.” On November 24, 2009, the Superintendent issued an order pursuant to Section 1310 of the NYIL, which was supplemented on March 25, 2010, (as supplemented, the “**1310 Order**”) requiring FGIC to “take such steps as may be necessary to remove the impairment of its capital and to return to compliance with its minimum surplus to policyholders’ requirement by not later than June 15, 2010.” (A copy of the 1310 Order and the supplement thereto is attached to the Rehabilitation Petition as **Exhibit D.**) As discussed above, FGIC still has a policyholders’ surplus deficit and has thus been unable to comply with the 1310 Order.

Because each of these three grounds is a sufficient basis for entry of the Proposed Rehabilitation Order, FGIC should be placed into rehabilitation.

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<sup>9</sup> Section 1309 of the NYIL provides: “Whenever the superintendent finds from a financial statement or report on examination that an authorized insurer is unable to pay its outstanding lawful obligations as they mature in the regular course of business, as shown by an excess of required reserves and other liabilities over admitted assets, or by its not having sufficient assets to reinsure all outstanding risks with other solvent authorized assuming insurers after paying all accrued claims owed, such insurer shall be deemed insolvent and the superintendent may proceed against it pursuant to the provisions of article seventy-four of this chapter.”

<sup>10</sup> See, e.g., the March 31, 2012 Quarterly Statement, attached to the Rehabilitation Petition as **Exhibit C**, reflecting a policyholders’ surplus deficit of approximately \$3.7 billion).



### **III. THE INJUNCTIVE RELIEF SHOULD BE GRANTED**

#### **A. Section 7419 of the NYIL Authorizes the Injunctive Relief**

The NYIL authorizes a broad spectrum of injunctive relief in insurer rehabilitation proceedings. Section 7419(a) of the NYIL provides that, “[u]pon application by the superintendent for an order to show cause under this article or at any time thereafter, the court . . . may without notice issue an injunction restraining the insurer, its officers, directors, shareholders, members, trustees, agents, servants, employees, policyholders, attorneys, managers, and all other persons from the transaction of its business or the waste or disposition of its property.” Section 7419(b) of the NYIL further provides that the Court may “at any time during a proceeding under this article issue such other injunctions or orders as it deems necessary to prevent interference with the superintendent or the proceeding, or waste of assets of the insurer, or the commencement or prosecution of any actions, the obtaining of preferences, judgments or other liens, or the making of any levy against the insurer, its assets or any part thereof.” The Injunctive Relief requested here falls squarely within the Court’s authority pursuant to Section 7419 and is necessary for several reasons.

#### **1. The Injunctive Relief Generally Applicable to All Insurers in a Rehabilitation Proceeding**

Most of the injunctive relief provided in the Order to Show Cause and the Proposed Rehabilitation Order is generally granted at the outset of New York rehabilitation proceedings and is necessary to enable the Superintendent to fulfill his statutory mandate “to take possession of the property of [the] insurer and to conduct the business thereof, and to take such steps toward the removal of the causes and conditions which have made such proceeding

necessary as the court shall direct.” NYIL § 7403(a).<sup>11</sup> As set forth in paragraphs 1 through 4 and 10 through 12 of the Order to Show Cause and paragraphs 6 through 9 and 15 through 17 of the Proposed Rehabilitation Order, this standard injunctive relief includes enjoining and restraining all persons and entities from (i) transacting FGIC’s business, (ii) wasting or disposing of FGIC’s property, (iii) interfering with the Rehabilitator’s possession, control, or management of FGIC’s property, (iv) disclosing any information that is proprietary to FGIC or not in the public domain, and (v) commencing, continuing, advancing, or otherwise prosecuting any actions, claims, lawsuits, arbitrations, alternative dispute resolution proceedings, or other legal or administrative proceedings against (a) the NYSDFS, the Superintendent, the Rehabilitator, the NYLB, any of their respective officers, employees, attorneys, representatives, or agents, or any directors, officers, employees, attorneys, representatives, or agents of FGIC or FGIC CP, in each case as related to, among other things, FGIC, FGIC CP, or the commencement or continuation of the Rehabilitation Proceeding; or (b) FGIC or FGIC CP. In addition, as set forth in paragraph 5 of the Order to Show Cause and paragraph 10 of the Proposed Rehabilitation Order, the Injunctive Relief enjoins and restrains all persons and entities from paying any claims or performing any obligations of FGIC or FGIC CP.<sup>12</sup> New York courts routinely grant these

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<sup>11</sup> See, e.g., *Callon Petroleum Co. v. Superintendent of Ins. of the State of N.Y.*, 53 A.D.3d 845, 845 (3d Dep’t 2008); *In re Allcity Ins. Co.*, 66 A.D. 531, 534 (1st Dep’t 1979).

<sup>12</sup> The Superintendent previously ordered FGIC to cease paying any and all claims as of November 24, 2009, pursuant to the 1310 Order; thus, the Proposed Rehabilitation Order merely extends the status quo until the effective date of a rehabilitation plan. The Superintendent expects a rehabilitation plan to be filed in this Rehabilitation Proceeding that will govern the timing, amount, and manner of payment of claims against FGIC. Similarly, paragraph 6 of the Order to Show Cause and paragraph 11 of the Proposed Rehabilitation Order merely extend the status quo by prohibiting all persons and entities from seeking to acquire, acquiring, or exercising voting or other corporate governance rights on account of FGIC’s outstanding preferred stock, as explained in greater detail in paragraph 5 of the Rehabilitation Petition.

standard injunctive provisions at the outset of insurance rehabilitation proceedings, and the Court should do so in this case.<sup>13</sup>

## 2. The Injunctive Relief Specific to Financial Guaranty Insurers in Rehabilitation Proceedings

In addition to the injunctive relief described above that is commonly granted at the outset of New York rehabilitation proceedings, paragraphs 7 through 9 and 13 of the Order to Show Cause and paragraphs 12 through 14 and 18 of the Proposed Rehabilitation Order set forth specific injunctive relief tailored to the unique circumstances of a financial guaranty insurance company such as FGIC. This more specific relief is necessary to, among other things, prevent dissipation of estate assets and prevent certain policyholders and other creditors of FGIC from taking advantage of the circumstances surrounding the Rehabilitation Proceeding and either increasing their claims against FGIC or taking away certain of FGIC's rights to the detriment of policyholders generally. In addition, such relief is consistent with "the paramount purpose of article 74," which "is the preservation and enhancement of the [estate's] assets to the end that the interests of all [the insurer's] creditors, policyholders, stockholders and the public will be subserved." *Corcoran v. Frank B. Hall & Co., Inc.*, 149 A.D.2d 165, 171 (1st Dep't 1989) citing *Knickerbocker Agency, Inc. v. Holz*, 4 N.Y.2d 245, 253 (1958). In addition, the more specific injunctive relief requested is similar to the relief granted by the Wisconsin court overseeing the rehabilitation proceeding concerning the Segregated Account of Ambac Assurance Corporation (the "**Ambac Proceeding**"), the only other court-supervised insurance rehabilitation proceeding ever filed that involved a financial guaranty insurer.

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<sup>13</sup> See, e.g., *In re Rehab. of Atl Mut. Ins. Co. and Centennial Ins. Co.*, Index No. 402424/10, ¶¶ 5-9 (N.Y. Sup. Ct. Sept. 16, 2010) *In re Rehab. of Prof'l Liability Ins. Co. of Am.*, Index No. 400986/10, ¶¶ 5-10 (N.Y. Sup. Ct. Apr. 28, 2010); *In re Rehab. of Lion Ins. Co.*, Index No. 405446/07, ¶¶ 4-8, (N.Y. Sup. Ct. Sept. 20, 2007) *In re Rehab. of Capital Mut. Ins. Co.*, Index No. 402044/00, ¶¶ 4-9 (N.Y. Sup. Ct. Aug. 10, 2000).

For example, paragraphs 7 through 9 and 13 of the Order to Show Cause and paragraphs 12 through 14 and 18 of the Proposed Rehabilitation Order provide for relief barring any person or entity from exercising rights under contractual *ipso facto* provisions, which exist in, among other things, certain financial guaranty policies and CDS contracts issued by FGIC CP and insured by FGIC. These *ipso facto* provisions provide that policyholders or counterparties may use the financial condition or insolvency of FGIC, or the commencement or continuation of this Rehabilitation Proceeding, as grounds for taking various actions, including (i) withholding or setting off payments otherwise owed to FGIC or FGIC CP, (ii) terminating the underlying contracts with FGIC CP and asserting significant Termination Payment claims against FGIC and FGIC CP, (iii) stripping FGIC or FGIC CP of valuable control rights over underlying collateral or related litigation, or (iv) terminating contracts, leases, or other arrangements with FGIC. The Injunctive Relief prohibits policyholders and counterparties from exercising these *ipso facto* provisions, thereby preventing immediate and irreparable harm to FGIC's estate, policyholders, and creditors.

Prohibiting all persons and entities from exercising these contractual *ipso facto* provisions falls squarely within the Court's authority under Section 7419 of the NYIL. Indeed, while the Legislature recently restricted the Court's power to prevent enforcement of certain *ipso facto* provisions in insurance rehabilitation proceedings, it specifically excluded rehabilitation proceedings concerning financial guaranty insurers from that restriction. New Section 7437(b)(1) of the NYIL states as follows:

Notwithstanding any other provision of [Article 74], including any other provision of this article permitting the modification of contracts, or other law of this state, no person shall be stayed or prohibited from exercising: (A) a contractual right to cause the termination, liquidation, acceleration or close out of any obligation under a netting agreement or qualified financial contract with an

insurer, *other than an insurer licensed to write financial guaranty insurance*, because of (I) the insolvency, financial condition, or default of the insurer at any time, provided that the right is enforceable under applicable law other than this article; or (II) the commencement of any proceeding under [Article 74].

(emphasis added). This provision clearly demonstrates the Legislature’s intent to preserve the Court’s authority to stay the exercise of *ipso facto* provisions in proceedings concerning a financial guaranty insurer, such as FGIC.

The Injunctive Relief is also consistent with federal bankruptcy and banking laws, which invalidate contractual *ipso facto* provisions. Sections 363(l) and 365(e)(1) of the Bankruptcy Code prohibit the enforcement of *ipso facto* clauses that may otherwise interfere with a debtor’s right to use, sell, or lease property, including by terminating or modifying a contract or lease with a debtor or any rights or obligations thereunder. 11 U.S.C. §§ 363(l), 365(e)(1). Similarly, in the context of a Federal Deposit Insurance Corporation (“**FDIC**”) receivership, federal law provides that “the conservator or receiver may enforce any contract . . . notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment or exercise of rights or powers by a conservator or receiver.” 12 U.S.C. § 1821(e)(13)(A). “In granting the FDIC this power, Congress codified the common law rule that *ipso facto* provisions are void as contrary to public policy.” *Bank of N.Y. v. FDIC*, 453 F.Supp.2d 82, 96 (D.D.C. 2006) *aff’d*, 508 F.3d 1 (D.C. Cir. 2007). Case law in New York and other jurisdictions further supports the Court’s authority to stay, modify, or terminate individual contractual rights for the benefit of all policyholders and the public.<sup>14</sup> Finally, the Wisconsin court overseeing the Ambac Proceeding

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<sup>14</sup> See *Corcoran v. Ardra Ins. Co.*, 166 A.D.2d 250 (1st Dep’t 1990) (noting that, pursuant to an Order of Liquidation, the Liquidator was authorized to terminate all existing contracts); *Foster v. Mut. Fire, Marine and Inland Ins. Co.*, 531 Pa. 598, 615 (Pa. 1992) (holding that impairment of contractual rights was permissible and noting that “the exigencies attendant to a major commercial insolvency and the goals

issued similar injunctive relief prohibiting the exercise of contractual *ipso facto* provisions in financial guaranty policies and other contracts (including CDS) that were subject to that rehabilitation proceeding.<sup>15</sup>

**B. The Rehabilitator May Exercise Authority Over Contracts Entered Into by FGIC CP**

Certain of the Injunctive Relief applies to actions that may be taken by a third party against FGIC CP. The Superintendent has determined that Injunctive Relief with regard to CDS contracts entered into by FGIC CP, and supported by financial guaranty insurance policies issued by FGIC, is necessary to avoid immediate and irreparable harm to FGIC's estate, to preserve FGIC's assets, and to further the rehabilitation of FGIC. FGIC CP is a wholly owned subsidiary of FGIC with nominal capitalization,<sup>16</sup> and FGIC CP's only business was to enter into CDS contracts, the vast majority of which were insured by financial guaranty insurance policies written by FGIC.<sup>17</sup>

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of rehabilitation necessitate the reality that individual interests may need to be compromised in order to avoid greater harm to a broader spectrum of policyholders and the public" (internal citations omitted)); *Dardar v. Ins. Guar. Ass'n*, 556 So.2d 272, 274 (La. Ct. App. 1990) (holding that "the rehabilitator, in an attempt to remove the causes and conditions which made the proceeding necessary, may cancel some or all of the issued policies"); *Carpenter v. Pac. Mut. Life Ins. Co. of Cal.*, 10 Cal.2d 307, 329 (Cal. 1937) (holding that, in the context of the liquidation or reorganization of an insurance company, "neither the company nor a policyholder has the inviolate rights that characterize private contracts"); *cf. In re Traders Compress Co.*, 381 F.Supp. 789, 795 (W.D. Ok. 1973) (holding that the court had the power to delay the enforcement of a contract in order to effect a reorganization of a company, and noting that bankruptcy courts, in restricting valid contractual rights, do not violate the due process clause of the Constitution or the provision of the Constitution relating to impairment of contracts).

<sup>15</sup> See *In re Rehab. of Segregated Account of Ambac Assurance Corp.*, Order for Temporary Injunctive Relief, Case No. 10-CV1576, ¶¶ 4-6 (Wis. Cir. Ct. Mar. 24, 2010) (hereafter "**Ambac Temporary Injunction Order**"), available at <http://ambacpolicyholders.com/court-filings/>.

<sup>16</sup> FGIC CP's assets as of March 31, 2012 were only approximately \$12.3 million, representing less than 0.2% of the total face amount of its CDS contracts (approximately \$6.1 billion).

<sup>17</sup> Pursuant to its CDS contracts, counterparties to such contracts pay FGIC CP amounts in return for FGIC CP agreeing to make payments upon the occurrence of any credit events under the CDS. FGIC CP pays 90% of the amounts it so receives to FGIC as premium payments for issuing the financial guaranty policies that insure FGIC CP's obligations under the FGIC-insured CDS.

Given this identity of interest between FGIC and FGIC CP and the potential harm that could be wrought to FGIC through actions involving FGIC CP, injunctive relief concerning FGIC CP is necessary to protect the assets of FGIC's estate and to ensure an orderly rehabilitation proceeding. Absent such relief, CDS contract counterparties could seek early termination of those contracts based on the commencement of this Rehabilitation Proceeding and assert Termination Payment claims which could trigger multi-billion dollar liabilities for FGIC.<sup>18</sup> This relief is consistent with the relief granted in the Ambac Proceeding,<sup>19</sup> is authorized by New York law,<sup>20</sup> and is necessary in this Rehabilitation Proceeding.

#### **IV. THE PROPOSED ORDER PROPERLY RECOGNIZES THE REHABILITATOR'S JUDICIAL IMMUNITY**

The Proposed Rehabilitation Order confirms that the Rehabilitator, the NYLB, and their respective employees, attorneys, representatives, and agents are not subject to liability for any action taken (or omitted from being taken) with respect to the Rehabilitation Proceeding, or any events, acts, or omissions leading up to the commencement of the Rehabilitation Proceeding, when acting in good faith, in accordance with the orders of this Court, and/or, in the

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<sup>18</sup> FGIC's potential liability for Termination Payment claims asserted against FGIC CP, pursuant to FGIC's insurance of FGIC CP's obligations under its CDS contracts, could exceed \$3 billion.

<sup>19</sup> See Ambac Temporary Injunction Order 1 (indicating that the injunctive relief granted pertains to Ambac Credit Products, LLC, a subsidiary of Ambac that entered into CDS contracts insured by Ambac).

<sup>20</sup> Sections 7401 and 1504 of the NYIL support the Superintendent's exercise of his authority over the CDS contracts entered into by FGIC CP and the inclusion of FGIC CP in the Injunctive Relief. Section 7401(a) of the NYIL states that "[Article 74] shall apply to all corporations, associations, societies, orders, firms, and individuals . . . which are subject to examination or supervision by the superintendent under this chapter or under any other law of this state." Section 1504 of the NYIL subjects all entities within the holding company system of a controlled insurer to certain reporting, examination, and publication requirements. Taken together, sections 7401(a) and 1504 of the NYIL provide that FGIC CP, as a wholly-owned subsidiary of FGIC that is subject to the Superintendent's examination under section 1504 of the NYIL (and the vast majority of liabilities of which are insured by FGIC), is subject to the rehabilitation provisions of Article 74 of the NYIL, including to injunctive relief authorized by section 7419 of the NYIL.

case of the Rehabilitator and the NYLB, in the performance of their duties pursuant to Article 74 of the NYIL. Judicial immunity under these circumstances is provided by well-established common law rules which dictate that a court-appointed receiver is entitled to judicial immunity for actions performed within his official capacity and within his court-appointed authority.<sup>21</sup>

In this case, the Rehabilitator is not acting in his capacity as a governmental official. Instead, the Rehabilitator acts in a private capacity under the supervision of this Court pursuant to Article 74 of the NYIL.<sup>22</sup> As such, the Rehabilitator and his agents are entitled to the judicial immunity typically accorded to court-appointed receivers.

Under these circumstances, public policy recognizes that the Rehabilitator and his agents and employees are entitled to judicial immunity so that the Rehabilitator may perform his receivership function without fear or threat of litigation. Confirmation of this judicial immunity in the Proposed Rehabilitation Order is appropriate to provide notice to parties in interest and to forestall potential disputes, thereby promoting the efficient resolution of these proceedings.

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<sup>21</sup> See, e.g., *Copeland v. Salomon*, 56 N.Y. 2d 222 (N.Y. 1982); *Bankers Fed. Sav. FSB v. Off W. Broadway Developers*, 227 A.D.2d 306 (1st Dep't 1996).

<sup>22</sup> *Dinallo*, 9 N.Y. 3d at 103 (explaining that the Superintendent's role as liquidator or rehabilitator of a distressed insurer is "judicial and private," while "his role as regulator and supervisor is administrative and public.").



CONCLUSION


For the reasons set forth above, this Court should grant the relief requested in the Rehabilitation Petition and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York  
June 11, 2012

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